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No. 91-1523

Supreme Court, U.S.
FILED
APR 29 1992
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In the

Supreme Court of the United States

OCTOBER TERM, 1991

FLORENCE COUNTY SCHOOL DISTRICT FOUR,
ERNEST K. NICHOLSON, SUPERINTENDENT,
IN HIS OFFICIAL CAPACITY,
AND SCHOOL BOARD MEMBERS BENNIE ANDERSON,
MONROE FRIDAY, JACK ODOM, ELRITA BACOTE,
T.R. GREEN, JAMES W. HICKS,
IN THEIR OFFICIAL CAPACITY,
PETITIONERS,

v.

SHANNON CARTER,
BY AND THROUGH HER FATHER AND NEXT FRIEND,
EMORY CARTER,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the parents of a child with a severe learning disability, who was denied a free appropriate public education, are entitled to reimbursement under the Individuals with Disabilities Education Act when they unilaterally placed her in a private placement that provided her with an appropriate education, i.e., one that is, consistent with *Board of Education v. Rowley*, reasonably calculated to enable her to receive educational benefits.

2. Whether a federal court may, after reviewing the administrative decision and based on a preponderance of the evidence, exercise its independent right of judicial review to find that a proposed individualized education program [IEP] which contains wholly inadequate long-term goals is not reasonably calculated to enable a child with a severe learning disability to receive educational benefits.

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No. 91-1523

In the
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October Term, 1991

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ERNEST K. NICHOLSON, SUPERINTENDENT, IN HIS OFFICIAL CAPACITY, AND SCHOOL BOARD MEMBERS BENNIE ANDERSON, MONROE FRIDAY, JACK ODOM, ELRITA BACOTE, T.R. GREEN, JAMES W. HICKS, IN THEIR OFFICIAL CAPACITY,

Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion and order of the United States Court of Appeals for the Fourth Circuit in this case. That opinion

and order are reported at 950 F.2d 156 (4th Cir. 1991).[1]

STATEMENT OF THE CASE

FACTS

Respondent Shannon Carter experienced academic difficulties from an early age. [JA 47; JA 358-59; JA 388]. From the time she enrolled in the seventh grade in petitioner Florence County School District Four in 1982, she experienced continued academic failure. [JA 358-59, JA 361]. Mrs. Carter requested that Shannon be tested after her first semester in the public school because she did not think her daughter could read. [JA 49]. Mrs. Carter's oldest child, a son who also attended public school in the petitioner district, had been diagnosed as having developmental dyslexia. [JA 358-59; JA 361; JA 385].

In February 1983, an educational evaluator for the district, Cecil Ray Hill, who was not certified as a school psychologist or qualified to assess students with learning disabilities [JA 72], tested Shannon. [JA 65]. He testified that he had no knowledge at the time as to how Shannon was performing in the classroom. [JA 71]. Although Mr. Hill was unable to locate any records of Shannon's test results at the time of trial [JA 66], he recollected that he administered to Shannon an IQ test and an achievement test, "more likely than not" the Wechsler Intelligence Scale for Children, Revised [WISC-R] and the Peabody Individual

[1] The opinion of the Court of Appeals is reprinted in the Appendix to petitioners' Petition for Writ of Certiorari, which is cited herein as "PA __." The unreported order and decision of the district court is also reprinted in the Appendix to the Petition, as well as in the Joint Appendix filed with the Court of Appeals and lodged by petitioners with the clerk of this Court. The Joint Appendix is cited as "JA __." The Petition for Certiorari is cited as "Pet. __."

Achievement Test [PIAT]. [JA 66]. He recalled that Shannon did not qualify as learning disabled because there was not a significant discrepancy between her slightly above average IQ and slightly below average achievement test results. [JA 66-67]. After this evaluation, which did not comply with the requirements of 34 C.F.R. §300.541, [JA 70, 78], Shannon's parents were told that their daughter could do the work if she wanted to, that she lacked motivation. [JA 49]. During the next two years Shannon continued to experience academic failure and was punished at home for poor grades and treated by her family as if she were lazy and unmotivated. [JA 49]. In the spring of 1985, Mrs. Carter again requested that Shannon be tested, for she had discovered that her daughter was failing most of her courses and had changed her first semester failing grades on her report card. Mrs. Carter was also very concerned that Shannon was manifesting symptoms of serious depression. [JA 138-39].

In April 1985, when Shannon was in grade 9, a certified school psychologist finally diagnosed her as having a learning disability. [JA 361-63]. Her evaluation indicated a verbal IQ of 81 and a performance IQ of 117, with various subtests indicating reading ability levels from 4.7 grade level to a 6.8 level. [JA 362, 364]. Despite these findings attesting to the presence of a severe learning disability, the school evaluation described her disability as "one which is felt to have been acquired and fostered over a period of time in which [Shannon] did not apply the skills which she seems to possess." [JA 363]. The individualized education program ("IEP"), which was proffered by the school system with its very limited program of less than 3 hours of special instruction per week, limited expectations and unacceptably limited long-term goals over more than a full school year [JA 158, 160-61; JA 226; JA 336-37; JA 366], similarly suggested that those who had prepared it did not share an understanding or perception that this child had a severe disability and had been denied years of

specialized instruction and related services which might have enabled her to compensate for her learning disability and to bridge the gap with her non-disabled peers. [JA 147-48; JA 347; JA 366]. At the May 1, 1985 IEP meeting, Mr. Carter indicated that he wanted his daughter to read on a 12th grade level when she was graduated from high school. [JA 118-19]. Mr. and Mrs. Carter were accompanied to the IEP meeting of May 1, 1985, by Linda Summers, a psychiatric social worker who had been privately engaged by Mr. Carter the prior February to provide counseling services to help Shannon cope with serious depression. In her professional capacity and as the individual who initially identified Shannon's disability [JA 386], she came to the IEP meeting to offer input into the development of a program that might enable Shannon to receive educational benefits. [JA 366]. Although she admonished the school district personnel not to put undue pressure on Shannon, whom the district had deprived of an appropriate education for more than three years, Ms. Summers very explicitly stated that she was not an educator. [JA 119].

Dr. Allison Grant, an independent child and adolescent psychiatrist, who evaluated Shannon in August that year, described her depressive symptoms as including "depressed mood, feelings of hopelessness and pessimism (especially around academics/school areas) and suicidal ruminations (contemplating cutting her wrist)...", which were present for a one and a half to two year period prior to the evaluation by Ms. Summer in February 1985. [JA 386; JA 223-25]. Specifically his written evaluation states that Shannon was unable to utilize some of the skill areas that she possesses not because of any "lack of motivation on her part or a result of passive-resistive and manipulative behaviors, but more a result of the failures of the [school] system." [JA 388-89]. "The failure of detection and needed academic approach", according to Dr. Grant's evaluation, "clearly interfered not only with her learning/academic progress but was the major (and

probably sole) factor ... for the significant depression that she has experienced...as well as the family conflicts..." [JA 388]. Shannon's learning disability was compounded by a belatedly diagnosed attention deficit disorder. [JA 149-50; JA 180-81]. Her learning disability was so severe that in the fall of 1985, she was described by a learning disability specialist as "functionally illiterate." [JA 173, 176]. She needed an intensive multi-sensory teaching program designed for children with neurologically based learning disabilities; this self contained program would provide a low student-teacher ratio, small classes, intense remediation in reading and written expression. [JA 173, 175; JA 187-89, 191; JA 388]. No intensive self contained program for students with neurologically based learning disabilities was available at Timmonsville High School [JA 85; 125, 133-34, 136; JA 148; JA 354-55]; nor did the petitioner school district ever offer to develop such a program to meet Shannon's educational needs. [JA 136; JA 148; JA 191; JA 240].

Faced with Petitioner's refusal to provide an appropriate IEP, respondent's parents enrolled her in Trident Academy, a private school specializing in the education of children with learning disabilities [JA 167-68; PA 28a] and fully accredited by the Southern Association of Colleges and Schools and the Palmetto Association of Independent Schools. [JA 208; PA 28a]. South Carolina school districts have placed students at Trident pursuant to IDEA on at least three occasions, as have districts in other states. [JA 209; PA 28a]. The South Carolina Department of Education has never disapproved an application for placement at Trident. [JA 210; PA 28a].[2]

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[2] Under South Carolina's regulatory scheme, private schools are approved by the Department of Education for special education placements on a case-by-case basis, in reference to a particular child at the behest of his or her local school district. See discussion *infra* at 22-24.

Trident set student goals on a quarterly basis, formulating them in much the same language as IEPs use. [JA 200; PA 11a]. During the first of Shannon's two years at Trident, her program included one forty-five minute period per day of one-to-one or two-to-one language development instruction [JA 169] with an uncertified teacher. [JA 195].[3] The district court's appointed expert concluded that Trident "did a very effective job" in teaching Shannon. [JA 330; PA 29a; see also JA 343-45].

REASONS FOR DENYING THE WRIT

This Court should deny *certiorari*, first, because the decision below presents no important issue which does not turn on the facts and particular circumstances of this case. The only issue presented here is whether the Fourth Circuit consistently applied this Court's prior decision granting "appropriate" relief in the form of retroactive reimbursement to parents who unilaterally placed their child in a private placement, proper under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§1400 *et seq.*, when the IEP in the public school was inappropriate. See *School Committee of the Town of*

[3] During the time Shannon attended Trident Academy, two of its faculty members were uncertified. [JA 195]. It is unclear from the record whether they lacked any teacher certification at all, whether they were certified elsewhere but not by South Carolina, or whether they were certified but not in special education. [See JA 195-96 (testimony of Margaret Mitchell, agreeing with statement that two Trident faculty members "are not certified teachers") and JA 314 (testimony of John Richardson, answering "yes" when asked if he had heard testimony that all but two of the teachers at Trident "are certificated in special education")]. State law permits public schools to have up to 10% of classroom instruction time taught by teachers teaching out of their area of certification. See S.C. Dept. of Educ., Defined Minimum Program for South Carolina School Districts (1986) at 53, reprinted at PA 71a-72a.

Burlington v. Department of Education, 471 U.S. 359 (1985). The Fourth Circuit concluded that when it is necessary for parents to place their child in a private school in order to obtain an appropriate education, a proper placement under the Act is one that provides the eligible student an appropriate education, i.e., one that is reasonably calculated to enable her to benefit from her special education program. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07 (1982). Resolution of this issue required the lower courts to analyze the plain language of the statute, specifically 20 U.S.C §1413(a)(4)(B), and exercise remedial discretion in the context of South Carolina's statutory scheme for ensuring the provision of free appropriate public education to all students with disabilities. Any determination by this Court as to whether the Fourth Circuit abused that discretion in this case will furnish minimal guidance to other federal courts addressing this issue in the context of different state statutory schemes.

Second, no actual conflict exists between the decision below and any decision by this Court or of any other Circuit Court of Appeals. The decision by the Fourth Circuit is distinguishable from that of the Second Circuit which previously exercised judicial remedial discretion peculiar to New York's system for approving private schools for special education placement and, in so doing, relied upon an interpretation of Fourth Circuit precedent repudiated in the decision below. The only other Court of Appeals decision addressing issues similar to those decided below, rendered by the Fifth Circuit, supports the Fourth Circuit result.

I. THE PETITION DOES NOT RAISE AN IMPORTANT, UNSETTLED ISSUE OF FEDERAL LAW.

The petitioner, Florence County School District Four, asks this Court to see this case as raising an important question about the remedial authority of the lower courts to expand the duty of public funding for private education beyond that required by IDEA. This is a non-issue. In *Burlington*, *supra*, this Court established the standards to be applied in considering when tuition reimbursement is an "appropriate" remedy under 20 U.S.C. §1415(e)(2). These principles control the disposition of the instant case.

This Court interpreted the language of section 1415(e)(2) directing a court to "grant such relief as [it] determines is appropriate" to include "the power to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP is proper under the Act." 471 U.S. at 369. Accordingly, parents are entitled to reimbursement for private school tuition costs if a court finds that the public school failed to provide a student with a disability a free appropriate public education, and if the private placement selected by the parents in fact provided an appropriate education to the student. This Court reasoned that parents, who choose to bear the risk of paying for private education when they believe the IEP proposed by the local public school is inappropriate for their child, should receive more than "an empty victory" if their decision is subsequently vindicated. *Id.* at 370. Indeed, the child's right to a free appropriate public education and the parent's right to participate fully in the development of a proper IEP would be seriously compromised were these private education related expenses not reimbursable. *Id.* at

370.[4]

In this case the Fourth Circuit affirmed the district court's reversal of the administrative decision finding that the petitioner school district's IEP provided respondent-student a free appropriate public education. The trial court properly reached an independent decision based on a preponderance of the evidence, *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 258 (4th Cir. 1988), after reviewing the administrative decision and record, and hearing testimony from eighteen witnesses, including an independent court appointed expert.

A. *The Petitioner School District Failed to Provide Respondent Student a Free Appropriate Public Education.*

1. *The record supports the finding that Petitioners' proposed IEP was not reasonably calculated to provide Shannon Carter an appropriate education.*

In determining that the petitioner school district failed to provide respondent Shannon Carter with a free appropriate public education the lower courts were guided by the two-fold inquiry set forth in *Rowley*. See 458 U.S. at 206-07. While finding no serious procedural non-compliance with IDEA [PA 35a], *see Hall v. Vance County Board of Education*, 774 F.2d 629, 635 (4th Cir. 1985), the courts found that Shannon's 1985 IEP, which was developed when she was 15 years old and enrolled in grade 9 in the Florence County School District Four system, was not "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. [PA 8a; JA 24, 32; PA 27a, 36a]. Substantial testimony and other

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[4] *See e.g., Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1161 (5th Cir. 1986).

evidence in the record support this finding.

Despite Shannon's being described as having a severe learning disability [JA 182, 184-85, 187; JA 226, 230, 338; JA 362, 364] with significant emotional overlay, manifested by depression, feelings of low self-worth and self-esteem, and suicidal thoughts [JA 139, 147, 154; JA 223-25, 385-87; JA 360], the IEP proposed and implemented by petitioner school district in early May 1985, called for Shannon to receive only three periods of learning disability itinerant classes[5] per week or less than three hours of special education. [JA 366]. The district court found that this program was inadequate to allow Shannon to "receive passing marks and advance from grade to grade." [JA 32, PA 36a]. This finding was based on a preponderance of the evidence presented through testimony at trial by Ms. Mitchell, who described Shannon upon her enrollment at Trident Academy in September 1985 as "functionally illiterate," [JA 176] Dr. Ward, [JA 186-88] and Dr. Grant [JA 226-28]. Court appointed expert, Dr. Nagle, also testified that Shannon would never have been able to achieve the level of academic progress [three grade level equivalents in three years] she subsequently attained at Trident Academy had she continued under the petitioner school district's IEP. [JA 326, 331-32].

The long-range goals in reading in the 1985-86 IEP [JA 365-377] consisted of four months' progress, from a reading grade level of fifth grade fourth month [5.4] to fifth grade, eighth month [5.8] over the course of the entire

[5] The South Carolina Board of Education Regulations 43-243, at page 144 explain the difference between an itinerant program and resource class as follows: In an itinerant program the specialist will provide continual ongoing services to handicapped pupils and teachers taught in regular classroom settings. A resource room program shall involve pupils who will remain in regular classrooms for the major part of the day and will be scheduled into the resource room for one or more periods of individualized instruction contingent on pupil's needs. [See PA 26a; JA 23, n.7].

school year. [JA 366]. The IEP goals for progress in math were also limited to four months' progress over the course of a year. [JA 366]. The trial court properly concluded, relying in part, on the expert testimony of Dr. Grant, Dr. Ward and Ms. Mitchell [JA 226-27; JA 186-87; JA 176] that these very limited "goals were wholly inadequate," [PA 27a; JA 24] particularly for a 15 year old student of above average intelligence, [JA 186-87; JA 362, 364] who despite years of academic failure, was not identified as having a severe learning disability by the school district until the spring of 1985. [JA 361-64]. Moreover, the court noted, even assuming these limited goals were met, Shannon would continue to "fall behind her classmates at an alarming rate." [JA 32; PA 36a]. On appeal the Fourth Circuit affirmed the district court's conclusion that the petitioner school district's itinerant program failed to provide Shannon an appropriate education. [PA 8a]. The appellate court determined that the district court's finding a goal of four months' progress over a period of more than a year was "rather modest" and "unlikely to permit her to advance from grade to grade with passing marks" was not clearly erroneous. [PA 8a].

Petitioners' contention that there is substantial evidence that Shannon made significant educational improvement during the limited period from May through June 1985, when the IEP at issue was actually being implemented [Pet. at 8] is deliberately misleading. Shannon's cumulative grades for the 1984-85 school year were 3 D's, 1 C, and she withdrew from a pre-algebra class that she was failing during her last quarter. [JA 53-54].[6]

[6] During the period from May to June 1985, when petitioner's IEP was being implemented, Shannon Carter was receiving private tutoring at her parents' expense one to two times per week and counseling from a psychiatric social worker employed by her parents; she had also been placed on a daily dosage of Ritalin for her belatedly diagnosed attention deficit disorder [JA 149-50; JA 297; JA 386, 388].

The trial court properly found, despite this so-called "improvement," that the proposed IEP did not provide Shannon with an appropriate public education reasonably calculated to enable her to receive educational benefits. [PA 36a; JA 32]. *Rowley* recognized that no single substantive standard can describe how much educational benefit is sufficient to satisfy the Act's requirement of a "free appropriate education", but stated that the benefit must be "meaningful," 458 U.S. at 191-92, and "sufficient." *Id.* at 202. Therein, the Court found that a young student with a severe hearing impairment had made substantial, though not the maximum conceivable progress, as measured by concrete educational outcomes.[7] Subsequently in *Hall v. Vance County Board of Education*, the Fourth Circuit declined to overturn a district court ruling that discounted the promotions from grade to grade of a student with disabilities in light of a school district's policy favoring social promotions, and marginal improvements in the student's test scores based on independent evaluations. Rejecting any notion that the lower court was compelled "by a showing of minimal improvement on some test results" to find that the school

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With these additional supportive services and after withdrawing from the pre-algebra course she was failing, Shannon passed three courses with C's, and received a grade of B in Physical Science. [JA 53]. The teacher, who was responsible for implementing the itinerant program for Shannon three periods per week from May to the end of the school year, testified that she was unaware that the student was being privately tutored during this period. She testified that this tutoring "could account for some" of the gain made in the last four weeks of the 1984-85 school year. [JA 297].

[7] The Court noted explicitly that the child, who was receiving considerable specialized instruction and related services, was performing above average in the regular classroom of a public school and advancing easily from grade to grade. *Rowley*, 458 U.S. at 185, 203.

district had provided the student with an "appropriate education," the appellate court stated, "[c]learly, Congress did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Id.*, 774 F.2d at 636.[8] To the contrary, for a special education program to be considered appropriate, reasonable educational progress must be demonstrated. *East Windsor v. Diamond*, 808 F.2d 987, 991-992 (3rd Cir. 1986).

2. *The appellate court did not exceed its authority under Section 1415(e)(2) by focussing on the limited annual goals of the proposed IEP in assessing its appropriateness.*

Petitioners' argument that the appellate court exceeded its authority under section 1415(e)(2) by focussing on the goals of the proposed IEP in determining whether the IEP was, consistent with *Rowley*, reasonably calculated to enable the child to receive educational benefits, is clearly without merit. As this Court has recognized, the IEP is more than a blueprint for the education a child is to receive; it is "the center piece of the statute's education delivery system for disabled children." *Honig v.Doe*, 484 U.S. 305, 311 (1988). By definition, the written document must, *inter alia*, contain a statement of the student's present level of educational performance, including a

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[8] Nor is the *Rowley* standard satisfied by evidence that the progress of a child with a disability, absent summer services, is *not* brought "to a virtual standstill." *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1158 (5th Cir. 1986)(citing *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269, 282 (3rd Cir. 1980)(Van Dusen, J. , concurring), *cert. denied sub nom., Scanlon v. Battle*, 452 U.S. 968 (1981).

description of the effect of the child's disability on academic and non-academic aspects of her performance, as well as a statement of annual goals and short term objectives. 20 U.S.C.§1401(a)(20), 34 C.F.R. Part 300, App. C. para.36(a). All problems noted in the statement of present educational performance are expected to have corresponding annual goals and short-term instructional objectives. 34 C.F.R. part 300, App. C, paras. 36(c), 38. Annual goals set forth what a student is expected to accomplish over a twelve month period; and short-term objectives should be measurable, intermediate steps toward accomplishing the corresponding annual goals. 34 C.F.R. part 300, App. C, paras. 38-39. Furthermore, goals and objectives set forth in the IEP "should focus on offsetting or reducing problems" associated with the child's disability which interfere with learning and educational performance. 34 C.F.R. part 300, App. C, para. 40.[9]

As the appellate court properly recognized, goals and objectives provide a basis for determining whether a child is progressing in and benefitting from her educational program, and thereby receiving an appropriate education. [PA 8a]; 34 C.F.R. part 300, App. C, para. 40. Accordingly, the appellate court properly affirmed the trial court's findings that the petitioner school district violated IDEA by failing to provide Shannon an appropriate education.

B. *Trident Academy Was a Proper Placement under the IDEA and Provided Shannon Carter an Appropriate Education.*

Under the principles established in *Burlington* by this Court the respondent, Mr. Carter, is entitled to

[9] "For example, if a learning disabled child is functioning several grades below the child's indicated ability in reading...the IEP goals and objectives would be directed toward (1) closing the gap between the child's indicated ability and current level of functioning,..." *Id.*

reimbursement for tuition and related costs associated with his daughter's receiving an appropriate education at Trident Academy. In finding that such placement was "proper under the Act," as required by *Burlington*, 471 U.S. at 369, the trial court relied on substantial undisputed testimony by respondent's witnesses [JA 190, 193-94; JA 228-29; JA 338-39; JA 343-45, 350-51, 388] as well as the court's own appointed expert, [JA 326, 328, 330, 341]. The Fourth Circuit in affirming this conclusion of law, explicitly held that the education provided to Shannon Carter was "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-207.[10]

The record reflects that Trident Academy is fully accredited by the Southern Association of Colleges and Schools, has accepted students under IDEA on numerous occasions, including at least three students placed by local school districts in South Carolina, and has never been disapproved as a special education placement by the South Carolina Department of Education. [JA 208-10]. Nevertheless, the trial court looked to actual test results obtained by its expert, Dr. Richard Nagle, who administered achievement tests [JA 318; JA 321; JA 324] to Shannon during the spring of 1988. The tests evidenced that Shannon had made substantial p[illegible]s, gaining, for example, more than three grade leve[illegible]uivalencies in reading comprehension in less than three school years at Trident Academy. [JA 323-325].

[10] The Court of Appeals, citing *Tice ex re. Tice V. Botetourt County School Board*, 908 F.2d 1200, 1208 (4th Cir. 1990), noted that this is the same standard by which the appropriateness of a public school IEP is assessed. [JA 17a].

II. THE APPELLATE COURT RULING IS CONSISTENT WITH THE INTENT OF THE STATUTE, THE LEGISLATIVE HISTORY, AND THE PLAIN LANGUAGE OF SECTION 1413(a)(4).

Despite protestations from the petitioner school district, there is nothing within the language of 20 U.S.C. §1413(a)(4)(B) that limits the availability of reimbursement as "appropriate relief" to only those parents who, having been forced by the public school's failure to provide their child with a free appropriate public education, succeed in obtaining an appropriate education for their child *in a private school that meets state education standards.* Nor, as the Fourth Circuit correctly realized is there any reference to the contrary in the legislative history of the Act, *see, e.g.*, S.Rep. No. 168, 94th Cong. 1st Sess. 32, 50, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1425, 1456, 1473. The statutory provision has no applicability to parental actions; it singularly applies to states and local school districts which must, as part of the continuum of placement alternatives they are required to maintain, *see* 20 U.S.C.§1412(5)(B); 34 C.F.R.§§300.550-300.551; S.C. Code § 59-33-50; S.C.Code R. 43-243(E)(7), provide private placements that meet state educational standards to children with disabilities whose needs cannot be met by their local educational agency and who will be referred and placed by the state or local educational agency. Consistent with this interpretation, both federal regulatory provisions and South Carolina law only apply state educational standards to private schools when the child is placed there by the state or local education agency. *See*, 34 C.F.R.§§300.400-300.403; 34 C.F.R. §300.347; S.C. Code §59-33-50 ("When a school district cannot...provid[e] for the education of its resident handicapped children because of insufficient numbers, the district may contract with other districts within the State or school systems or public or private institutions or agencies within or without the State

which maintain approved special educational facilities...."); S.C. Code Regs. 43-243(E)(7)(1987) ("Whenever handicapped children are placed in private schools by the SEA/LEA, such private schools must be in compliance with the standards of the SEA/LEA").

The plain language of 20 U.S.C. §1413(a)(4)(B) reads as follows:

> "...Each [State] plan shall-
> set forth policies and procedures to assure...that-
> (i) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, *if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency* as a means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State; and
> ii) *in all such instances*, the State educational agency shali determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies..."

20 U.S.C. §1413(a)(4)(B)(West 1990 & Supp. 1991)(emphasis added).

In 1988, this Court relied on the plain language of IDEA and its legislative history to interpret section 1415(e)(3) [20 U.S.C.§1415(e)(3)], the so-called "stay-put" or "status quo" provision to bar school officials from "changing the educational placement" of a dangerous or disruptive student with emotional disabilities without his

parent's consent. *Honig v. Doe*, 484 U.S. at 323-28. This particular provision of the statute directs that a student with a disability "shall remain in [his/her] current educational placement..." pending completion of any review proceeding, unless the state or local education agency and the parent otherwise agree. Writing for the majority, Brennan, J. stated that the language of section 1415(e)(3) is unequivocal and contains no emergency exception for a dangerous or disruptive student based on the plain language of section 1415(e)(3) and the legislative history of the Act attesting to Congress' intent to educate all children with disabilities, including those with severe behavioral manifestations. *Id.* at 323-25.

As the language of §1415(e)(3) is *unequivocal* and contains no emergency exclusion provision, the language of §1413(a)(4)(B) similarly contains no restriction on Mr. Carter's right to reimbursement for costs associated with Trident Academy's having provided his daughter with the appropriate education to which she was entitled and was denied by the petitioner school district. As the Fourth Circuit so clearly understood, "[c]onditioning reimbursement under *Burlington* on state approval of the private school would undermine the values and policies the Act was enacted to further." [PA 19a].

III. THERE ARE NO CONFLICTS WHICH WARRANT THE GRANTING OF THE PETITION, AND REVIEW BY THIS COURT WOULD BE PREMATURE IN ANY EVENT.

Among the Courts of Appeals, only the Second and Fifth Circuits have addressed issues similar to those raised below. The Fifth Circuit ruling came in *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986), where the lower court, acting before this Court's decision in *Burlington*, had held that a Texas school district should have provided a child

with summer services over a period of two years, but did not explicitly find that the substitute services obtained by his parent "constituted the specific type of programming necessitated by the Act." 790 F.2d at 1161. Holding that reimbursement remains available even where the program obtained by the parent "might not have been adequate under the EAHCA [IDEA]," 790 F.2d at 1161, because "[t]he *Burlington* rule is not so narrow as to permit reimbursement only when the interim placement chosen by the parent is found to be the exact proper placement under the Act," *id.*, the Fifth Circuit remanded the matter for a determination of the amount of reimbursement due under the circumstances. *Id.*[11] The Fourth Circuit's decision here is not only perfectly consistent with, but is supported by, the Fifth Circuit's decision.[12]

The Second Circuit ruling came in *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563 (2nd Cir 1989). With scant analysis or explanation of the purported

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[11] The Fifth Circuit's analysis and disposition were consistent with this Court's holding in *Burlington* that "equitable considerations are relevant in fashioning relief," 471 U.S. at 374, for violations of IDEA rights. *Id.*

[12] See also *Garland Independent School District v. Wilks*, 657 F. Supp. 1163, 1166-67 (N.D. Tex. 1987) (Low income parent was entitled to reimbursement for furnishing those services intended, to the extent the parent could afford, to create a "facsimile" of the residential placement ultimately ordered by the court). In addition, at least one state court has reached the same conclusion reached below. The Massachusetts Supreme Judicial Court has held that consistent with *Burlington*, parents may be reimbursed for unilateral private placements not on Massachusetts' list of approved schools. *See Carrington v. Commissioner of Education*, 404 Mass. 290, 296; 535 N.E.2d 212, 216 (1989).

conflict,[13] petitioners' claim that the decision below creates a conflict with *Tucker* warranting *certiorari*. [Pet. 13, 17]. The perceived conflict is illusory. First, the *Tucker* court did not sanction the results that ensue if petitioner's reading of *Tucker*--in which "state approval" meant approval under the regulatory scheme of the state of New York--is applied to the instant case, where "state approval" means approval under South Carolina's very different scheme. Second, *Tucker* did not condition reimbursement under *Burlington* upon compliance with the four-pronged statutory definition of "free appropriate public education." Third, *Tucker* ultimately rests on an interpretation of Fourth Circuit precedent rejected by the Fourth Circuit in the decision below.

A. *Tucker Is Not Applicable to States With Private School Approval Mechanisms Like South Carolina's.*

1. *Tucker by its terms assumes an approval mechanism like New York's.*

In Tucker, parents sought reimbursement for

[13] Petitioner describes the purported conflict as follows:

> "[t]he decision below creates a direct conflict over whether parents...may be entitled to reimbursement ...where they unilaterally transfer their child...to a private school which is not in compliance with state educational standards and otherwise fails to meet the statutory definition of a free appropriate public education." [Pet. 13]. As discussed *supra* at 6 n.3, the record below does not necessarily support the assertion that Trident Academy was not in compliance with state educational standards on teacher certification--the only area of possible noncompliance cited by petitioners--during the relevant time period. The district court made no finding of fact on this issue. [PA 28a n.10].

placement in a private school not included on the list New York maintained of private schools approved by the State Education Department for the provision of special education.[14] Although IDEA does not require states to maintain such a list, New York's system permitted a private facility seeking inclusion on the list to apply to the State Education Department which, after ascertaining that the school met state standards, approved it as a special education placement for New York students. See *Antkowiak v. Ambach*, 838 F.2d 635, 640-41 (2nd Cir.), *cert. denied*, 488 U.S. 850 (1988), discussion incorporated by reference in *Tucker*, 873 F.2d at 565. The school was then eligible to contract with local school boards for the provision of educational services to particular students. See *Antkowiak*, 838 F.2d at 640-41. Private facilities could apply for the approval necessary to be placed on the list quite apart from any admission, application or individual contract approval decisions regarding a particular New York child. *Id.*

The Second Circuit affirmed the district court's judgment for the school district, holding that New York parents may not obtain reimbursement for placement in schools not on New York's approved list. *Tucker*, 873 F.2d

[14] Contrary to the instant case, where there is no evidence that Trident Academy was ever disapproved by South Carolina for the provision of special education (generally or to any particular student), and where Trident apparently was approved to educate at least three South Carolina children, see *supra* at 5, the *Tucker* school may have been affirmatively disapproved by New York authorities. The Second Circuit's decision noted that "[t]here was evidence before the hearing officer that would suggest that Eagle Hill's unapproved status was at least in part the consequence of its unwillingness to follow the state approved curriculum or to admit emotionally disturbed students." *Tucker*, 873 F.2d at 564 n.1.

at 568.[18]

Critical to this holding was the fact that such a list of approved schools from which parents might identify a proper placement did, indeed, exist. By resort to the list New York parents could easily determine which schools have been approved by the state as meeting state educational standards. In conditioning *Burlington* relief upon placement at a state approved school, *Tucker* assumed, as per the particular state approval process before it, the existence of some number of private schools already generally approved by the state as special education facilities.

Nothing in the Second Circuit's decision contemplates any other sort of state scheme. Nowhere does *Tucker* require parents to initiate a state approval process where a state does not generally approve private schools. Nowhere does it put the onus on parents to determine whether a particular school could or would meet the standards required for state approval, or any other state educational requirements, where a state does not generally approve private schools. The Second Circuit's decision goes only so far as to require parents to choose from a list of schools already generally approved for the provision of special education in states where such a list exists.

South Carolina is not such a state. Unlike New York, South Carolina approves private schools for special education placements only on a case-by-case basis, only in reference to the proposed placement of a particular child, and only when the proposed private school placement is

[18] The court reasoned that placement in an unapproved school could not be proper under the Act, as *Burlington* requires, because it would abridge the requirement that placements "meet the standards of the State educational agency." 873 F.2d at 568, quoting 20 U.S.C. §1401(a)(18)(B). The significance of the court's citation to §1401(a)(18)(B)–a component of the statutory definition of "free appropriate public education" is discussed *infra* at 25-26.

initiated by the state or a local educational agency ("LEA"). S.C. Code R. 43-243(E), the relevant State regulation, provides in pertinent part only that

> "The State Department of Education shall have the responsibility to insure that educational programs and related services, when necessary, are provided to handicapped children in private schools at no cost to their parents--provided that such children are placed in private schools *by the LEA/SEA*. When it is necessary to accord special education and related services in programs other than the public schools, such placements shall not transpire until it has been determined that the child cannot be appropriately served by another governmental agency of South Carolina...When it is clearly not feasible to accord educational opportunity to handicapped children in a public school program, *the LEA* may contract with other agencies or organizations, public or private...*provided that proper application has been made by the LEA* and approved by the State Department of Education...
>
> ***
>
> (1) Upon submission *by the LEA* of a properly completed application...the Director, Office of Programs for the Handicapped, State Department of Education, may approve said application..."

Emphasis added. There is no list of approved private schools already determined by state education authorities to meet state standards, no mechanism by which a private school can apply for general approval to serve as a special education placement, no basis for *parents* to determine whether a particular private school meets state education

standards, and no mechanism for parents to seek approval for such a school.

Given these critical differences between the New York and South Carolina approval systems, *Tucker* by its own terms has no application here. There is thus no conflict between *Tucker* and the Fourth Circuit's treatment of this South Carolina matter.

2. *Construing Tucker to require state approval in states like South Carolina produces absurd results.*

If stretched beyond its facts and state law context to require "state approval" regardless of variations among the states, *Tucker* leads to the absurd conclusion that there can be no *Burlington* remedy in South Carolina because the state--whose failure to fulfill its IDEA obligation to ensure the provision of an appropriate education, see 20 U.S.C. §1412(6), triggered respondent's recourse to unilateral placement--will only approve private schools on a case-by-case basis at the behest of the offending school district.

The result is equally absurd if *Tucker* is stretched to impose upon parents a duty to determine whether a particular school meets state education standards in states that do not maintain lists of approved schools. In South Carolina, for example, if a child with disabilities is placed in a private school by the State education agency or local school district, the private school must comply with, *inter alia*, the Defined Minimum Program for South Carolina School Districts ("DMP") promulgated by the State Board of Education. S.C. Code R. 43-243(E)(7). The table of contents of the DMP is seven pages long, the DMP itself more than 130 pages. See S.C. Dept. of Educ., Defined Minimum Program for South Carolina School Districts (1986). Parents cannot reasonably be expected to assess compliance with these voluminous standards.

B. *Tucker Did Not Hold that Reimbursement Rights Extend Only to Placements in Private Schools That Meet the Four-Pronged Statutory Definition of "Free Appropriate Public Education."*

IDEA defines "free appropriate public education" as special education and related services that "(A) have been provided at public expense, under public supervision and direction, without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title." 20 U.S.C. §1401(a)(18). "Individualized education program" is further defined by 20 U.S.C. §1401(a)(20) as "a written statement...developed in any meeting by a *representative of the local educational agency or intermediate educational unit*...the teacher, the parents or guardian of such child, and, whenever appropriate, such child..." Emphasis added. Section 1414(a)(5) requires a local school district applying to the State for IDEA funds to "provide assurances that...[it]...will establish or revise...an individualized education program...at the beginning of each school year..." 20 U.S.C. §1414(a)(5).

Tucker quotes the language of §1401(a)(18)(B) in support of its holding that private schools must be selected from the approved list without even noting that the provision is a component of the statutory definition of "free appropriate public education." *See* 873 F.2d at 568. Sections 1401(a)(18)(A), (C) and (D)--the remaining three prongs of the four-pronged definition--are neither acknowledged in the decision nor implicated by its facts. *Tucker* thus neither raised nor decided the issue of whether §1401(a)(18) limits the remedies under *Burlington* and, contrary to petitioners' assertion, there can be no "direct

conflict over whether parents...may be entitled to reimbursement ...where they...transfer their child...to a private school which...fails to meet the statutory definition of a free appropriate public education." [Pet. 13].

C. *Tucker Is Grounded On An Interpretation of Fourth Circuit Precedent Rejected By the Fourth Circuit in the Decision Below.*

Tucker relied solely upon *Antkowiak*, *supra*, in reaching its result. *See Tucker*, 873 F.2d at 568. In Antkowiak, a different panel of the Second Circuit had held that "[n]either the *SED* [New York State Education Department] nor the *Buffalo School Board* could place and fund...[the student] in an unapproved private school 'without violating the EHA's requirement that handicapped children be educated at public expense only in those private schools that meet [s]tate educational standards.'" *Antkowiak*, 838 F.2d at 640, quoting *Schimmel v. Spillane*, 819 F.2d 477,484 (4th Cir. 1987) (emphasis added). The district court thus acted improperly when it ordered education officials to place the student at a school not on the state's approved list. *Antkowiak*, 838 F.2d at 640-41.[16]

Antkowiak, the sole support in *Tucker*, relied exclusively upon the Fourth Circuit's decision in *Schimmel* to reach this result. *See Antkowiak*, 838 F.2d at 640. In the decision below in the instant case, however, the Fourth

[16] *Tucker* deemed *Antkowiak* dispositive, 873 F.2d at 568, even though the opinion in the latter did not discuss or hold on reimbursement issues. The district court judgment reversed in *Antkowiak* had ordered reimbursement as well as prospective placement; the *Tucker* panel concluded that the *Antkowiak* panel must have vacated the award of reimbursement for the same reason that it vacated the prospective placement order, "namely, the unapproved status of the placement." *Tucker*, 873 F.2d at 568.

Circuit explicitly limited *Schimmel* to situations where the school district *has* offered an appropriate placement, holding it inapplicable to cases like this one and *Tucker*, in which the school systems *fail* to do so. See 950 F.2d at 162-63; [PA 14a-15a]. The purported "conflict" between *Tucker* and the decision below is actually a conflict between the Fourth Circuit and the Second Circuit over the proper interpretation of Fourth Circuit precedent. This is not the sort of direct conflict that warrants review of the Fourth Circuit's decision by this court.

D. *Review of Any Perceived Conflict Would Be Premature at This Time.*

Few federal courts have addressed the issue of whether a unilateral placement must be made into a state approved school or otherwise meet state educational standards in order to qualify for *Burlington* reimbursement. It appears that no federal court outside of the Second Circuit--indeed, outside of New York--has conditioned *Burlington* reimbursement upon prior state approval of the private school in question. This Court should refrain from entertaining these issues until more courts have spoken to them so that it can have the benefit of a fuller exploration of the various contexts in which these questions may arise, and of the consequences of differing legal rulings.

The ruling below gives rise to no consequences favoring earlier review by this court. Contrary to petitioner's claim, [Pet. 18-19], the Fourth Circuit's decision does not relieve states of their continuing duty to provide a free appropriate public education. Parental placement and litigation to obtain reimbursement is not, as petitioners assert, "an alternative manner of fulfilling," [Pet. 19], the state's IDEA obligation to provide a free appropriate public education, *id.*, to which the statutory definition of that term ought therefore apply. It is a

remedy for *violation* of that obligation. By the very nature of that adversarial situation, at least two of the four components of the statutory definition inevitably will not be met by the private placement: special education and related services will not have been provided "under public supervision," 20 U.S.C. §1401(a)(18)(A), and they will not have been "provided in conformity with the individualized education program," 20 U.S.C. §1401(a)(18)(D), that, by its own statutory definition, must have been "...developed in any meeting by a representative of the local educational agency or intermediate educational unit..." 20 U.S.C. §1401(a)(20).

IDEA already provides a mechanism for assuring that educational agencies fulfill their ongoing duty to make available a free appropriate public education even after school district violations spur parents to unilateral placement and litigation. As the First Circuit held in the reimbursement case that led to this court's decision in *Burlington*, IDEA requires "[t]he continuation of the IEP process during the pendency of litigation." *Town of Burlington v. Department of Education*, 736 F.2d 773, 794 (1st Cir. 1984). "[P]ending review of an earlier IEP, local educational agencies should continue to review and revise IEPs in accordance with applicable law, at least in the absence of a stipulation between the parties providing for how the outcome of the suit will affect later years." *Id.*[17]

The decision below is no more an "open invitation" [Pet. 20] to parents "to circumvent rather than capitalize

[17] In addition, IDEA includes explicit statutory mechanisms for assuring that *states* take appropriate action when *local* educational agencies like petitioner violate IDEA rights. Chief among these are the ongoing obligation of the State education agency to monitor and enforce local compliance with statutory requirements, see 20 U.S.C. §1412(6), and the obligation to serve disabled children directly under certain circumstances when a local school district fails to offer an appropriate education. See 20 U.S.C. §1414(d)(1).

on public school services," *id.*, than is this court's decision in *Burlington*. Any costs beyond those that would have been incurred had petitioners provided an appropriate public school program are attributable to petitioners' failure to do so--not to the rights recognized by the court of appeals. Furthermore, the cost of providing an appropriate education may not dictate the placement chosen for a child with disabilities. *Barnett v. Fairfax*, 927 F.2d 146, 154 (4th Cir. 1991). Cost may be considered only when a choice exists among a selection of placements, all of which are appropriate to meet the child's educational needs. *Clevenger v. Oak Ridge School Board*, 744 F.2d 514, 517 (6th Cir. 1984); *cf. In re Smith*, 926 F.2d 1027 (11th Cir. 1991) (granting writ of mandamus and directing district court to approve settlement agreement calling for $160,000 placement under IDEA that lower court had rejected as against public policy because too expensive).

The students of Florence County School District Four would be better served if, rather than raising such false policy alarms, petitioners reexamined their special education system. That system failed to identify respondent's severe disability and, once compelled to recognize it by her parents, failed to address it in any meaningful way. Petitioners may be similarly failing other students.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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April 29, 1992

APPENDIX

S.C. Code §59-33-50. Establishment and operation of programs by school districts; contracts between districts; special arrangements for multiple-handicapped children.

The board of trustees of each school district shall, upon approval of its district's plan by the State Department of Education, establish and operate a program which will insure an appropriate education for each handicapped child resident within the district and shall maintain adequate records of the training and services provided and the children participating in the program. When a school district cannot satisfy the requirements of this section by providing for the education of its resident handicapped children because of insufficient numbers, the district may contract with other districts within the State or school systems or public or private institutions or agencies within or without the State which maintain approved special education facilities; *provided*, that such institutions or agencies shall accept applicable children into the program regardless of color, race, sex or religion. The sending district must document this lack of numbers and receive prior approval from the State Department of Education. The sending district may contract and pay the receiving district or institution the per capita cost of instruction, special equipment and special services not reimbursed to the receiving district by State, Federal and other moneys plus the cost of transportation and of maintenance if the nonresident children must reside away from their homes. The district which enters into such nonresident contract arrangements, which are approved by the State Department of Education, shall be reimbursed by the department for tuition, fees, transportation and books, not to exceed the per pupil cost of education a handicapped child of identical age in the public schools. Special arrangements for multiple-handicapped children for whom

special appropriations are provided because of the severity of their handicaps may be made with the Department.

S.C. Code R. 43-243(E). Policies Governing Placement in Private Schools. When Necessary to Carry Out the Requirements of the Act

The State Department of Education shall have the responsibility to insure that educational programs and related services, when necessary, are provided to handicapped children in private schools at no cost to their parents--provided that such children are placed in private schools by the LEA/SEA. When it is necessary to accord special education and related services in programs other than the public schools, such placements shall not transpire until it has been determined that the child cannot be appropriately served by another governmental agency of South Carolina. After determination has been made that neither the public schools nor another governmental agency of the state can adequately provide these services, then private programs within the state become the third alternative of choice. If such programs are still inadequate, then out of state private programs may be approved. Clearly, the intent of this policy is to insure economic efficiency to the maximal extent possible. When it is clearly not feasible to accord educational opportunity to handicapped children in a public school program, the LEA may contract with other agencies or organizations, public or private, within or outside South Carolina, provided that proper application has been made by the LEA and approved by the State Department of Education. Children enrolled in such programs shall have all the rights they would have if served by the LEA and the agency or organization must meet all the standards applicable to the LEA/SEA.

1. Upon submission by the LEA of a properly completed application form and any supplemental information that may be required, the Director, Office of Programs for the Handicapped, State Department of Education, may approve said application. Approval in this instance shall be made only for those applications where it is clearly practicable to provide special education and related services in a public school setting.

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